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No. 85-5404

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TERRY B. ALLEN,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari To The Illinois Supreme Court

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

I. Should the fifth amendment privilege against compulsory self-incrimination, made applicable to the states by the fourteenth amendment due process clause, be extended to commitment proceedings held under the Illinois Sexually Dangerous Persons Act to provide psychiatric care to mentally ill, sexually dangerous persons.

II. In light of *Miranda v. Arizona*, 384 U.S. 436 (1966), if the fifth amendment privilege does apply to those proceedings, can the protection nevertheless be waived without formal rights admonition by a counseled respondent during psychiatric examination.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW ..	i
TABLE OF AUTHORITIES	iv
OPINIONS AND JUDGMENTS BELOW	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT:	
I.	
THE ILLINOIS SEXUALLY DANGEROUS PERSONS ACT PROVIDES A CIVIL, INVOLUNTARY COMMITMENT ALTERNATIVE TO CRIMINAL PROSECUTION TO WHICH THE FIFTH AMENDMENT PRIVILEGE DOES NOT APPLY	7
A. In Both Purpose And Effect, The Act Provides A Medico-Legal Inquiry After Which Persons Suffering From Mental Disorders Are Committed For Psychiatric Care	11
B. The Fourteenth Amendment Due Process Clause Does Not Require A Privilege Against Self-Incrimination To Assure Fundamental Procedural Fairness In Sexually Dangerous Persons Proceedings	20
C. The Historical Fifth Amendment Values Of Freedom From Coercion And A Fair Balance Between The State And Its Individual Citizens Are Not Served By Extension Of The Privilege To A Mental Health Commitment Context	28

D. A Right To Silence During Psychiatric Examinations Would Thwart The Diagnostic And Treatment Purposes Of The Proceedings .. 33

II.

BECAUSE PSYCHIATRIC EXAMINATIONS DO NOT PRESENT THE INHERENTLY COERCIVE ATMOSPHERE CONDEMNED IN *MIRANDA v. ARIZONA*, 384 U.S. 436 (1966), ANY FIFTH AMENDMENT PRIVILEGE IS NOT SELF-EXECUTING AND MUST BE CLAIMED BY A COUNSELED EXAMINEE .. 35

CONCLUSION 39

APPENDIX

Menard Psychiatric Center's April 1983 Statistical Report ..... App. 1

TABLE OF AUTHORITIES

Cases	Page
Adams v. Maryland, 347 U.S. 179 (1954)	19
Addington v. Texas, 441 U.S. 418 (1979)	*passim*
Barefoot v. Estelle, 463 U.S. 880 (1983)	21, 24, 32
Baxstrom v. Herold, 383 U.S. 107 (1966)	13, 19
Baxter v. Palmigiano, 425 U.S. 308 (1976) ..	27, 30, 36, 37
California v. Byers, 402 U.S. 424 (1971) ...	19, 30, 32
Commonwealth v. Barboza, 387 Mass. 105, 438 N.E. 2d 1064, *cert. denied*, 459 U.S. 1020 (1982) ...	14, 38
Commonwealth ex rel. Finken v. Roop, 234 Pa. Super. 155, 339 A.2d 764 (1975), *cert. denied*, 424 U.S. 960 (1976)	34
Cross v. Harris, 418 F.2d 1095 (D.C. Cir. 1969)	13, 16, 17, 24
Culombe v. Connecticut, 367 U.S. 568 (1961)	31, 32, 33
Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), *vacated on other grounds*, 422 U.S. 563 (1975)	16, 24
Duncan v. Louisiana, 391 U.S. 145 (1968)	22
Estelle v. Smith, 451 U.S. 454 (1981)	*passim*
Fare v. Michael C., 442 U.S. 707 (1979) ..	26, 29, 36, 38
French v. Blackburn, 428 F.Supp. 1351 (M.D.N.C. 1977), *aff'd mem.*, 443 U.S. 901 (1979) ..	10, 15, 26
Gagnon v. Scarpelli, 411 U.S. 778 (1973)	25

Gardner v. Broderick, 392 U.S. 273 (1968) 8

Garner v. United States, 424 U.S. 648 (1976) .. 38

Gomes v. Gaughan, 471 F.2d 794 (1st Cir. 1973) . 13, 32

Hollis v. Smith, 571 F.2d 685 (2d Cir. 1978) 13, 30

Humphrey v. Cady, 405 U.S. 504 (1972) ... 13, 16, 17

In Re Field, 120 N.H. 206, 412 A.2d 1032 (1980) . 17

In Re Gault, 387 U.S. 1 (1967) ..... *passim*

In Re Matthews, 46 Or. App. 757, 613 P.2d 88 (1980) 28

In Re Ottolini, 73 Ill.App.3d 971, 392 N.E.2d 736 (1979) 36

In Re Winship, 397 U.S. 358 (1970) 21, 23, 25

Johnson v. Zerbst, 304 U.S. 458 (1938) 39

Kastigar v. United States, 406 U.S. 441 (1972) .. 19

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) 8, 11, 14, 17

Lefkowitz v. Turley, 414 U.S. 70 (1973) 19

Mahler v. Eby, 264 U.S. 32 (1924) 11

Malloy v. Hogan, 378 U.S. 1 (1964) 22, 29

Mathews v. Eldridge, 424 U.S. 319 (1976) .. 22, 27, 28, 29

McKeiver v. Pennsylvania, 403 U.S. 528 (1971) . *passim*

McNeil v. Director, Patuxent Inst., 407 U.S. 245 (1972) 10, 13

Michigan v. Tucker, 417 U.S. 443 (1974) 29, 31

Middendorf v. Henry, 425 U.S. 25 (1976) 8, 25, 26

Millard v. Harris, 406 F.2d 964 (D.C. Cir. 1968) . 13, 24

Minnesota v. Murphy, 465 U.S. 420 (1984) .. *passim*

Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270 (1940) 10, 14, 17, 22

Miranda v. Arizona, 384 U.S. 436 (1966) ... 27, 35-39

Morrissey v. Brewer, 408 U.S. 471 (1972) .. 22, 25, 27

Moss v. State, 539 S.W.2d 936 (Tex. Civ. App. 1976) 36

Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964) 19, 29, 31

Overholser v. Lynch, 288 F.2d 388 (D.C. Cir. 1961) (en banc), *rev'd on other grounds*, 369 U.S. 705 (1962) 17

Parham v. J.R., 442 U.S. 584 (1979) 22, 25, 32

Pate v. Robinson, 383 U.S. 375 (1976) 39

Patterson v. New York, 432 U.S. 197 (1977) ... 22

Paul v. Davis, 424 U.S. 693 (1976) 25

People v. Allen, 123 Ill.App.3d 669, 463 N.E.2d 135 (1984), *rev'd*, 107 Ill.2d 91, 481 N.E.2d 690 (1985) ..... *passim*

People v. Burkhart, 116 Ill.App.3d 708, 452 N.E. 2d 375 (1983) 12, 13, 16, 18

People v. Capoldi, 10 Ill.2d 261, 139 N.E.2d 776 (1957) 15, 27

People v. Chapman, 301 Mich. 584, 4 N.W.2d 18 (1942) 14, 17

People v. Fish, 36 Ill.2d 220, 221 N.E.2d 637 (1966) . 12

People v. Levy, 311 P.2d 897 (Cal. Ct. App. 1957) . 26

People v. Lindsey, 45 Ill.2d 115, 256 N.E.2d 808 (1970) 18

People v. Nastasio, 19 Ill.2d 524, 168 N.E.2d 728 (1960) 26

People v. Patch, 9 Ill.App.3d 134, 293 N.E.2d 661 (1973) 12

People v. Pembrock, 62 Ill.2d 317, 342 N.E.2d 28 (1976) 14, 27

People v. Pygott, 64 Ill.App.2d 284, 211 N.E.2d 382 (1965) 15

People v. Redlich, 402 Ill. 270, 83 N.E.2d 736 (1949) 12

People v. Sansone, 18 Ill.App.3d 315, 309 N.E.2d 733 (1974) 13, 15

People v. Shiro, 52 Ill.2d 279, 287 N.E.2d 708 (1972) 13, 18

People v. Sims, 382 Ill. 472, 47 N.E.2d 703 (1943) . 12, 14

People v. Sly, 82 Ill.App.3d 742, 403 N.E.2d 72 (1980) 17, 18

People v. Studdard, 51 Ill.2d 190, 281 N.E.2d 678 (1972) 18, 26

People v. Whitney, 33 Ill.App.3d 729, 338 N.E.2d 233 (1975) 12, 18

Pope v. United States, 372 F.2d 710 (8th Cir. 1967) (en banc), *vacated and remanded on other grounds*, 392 U.S. 651 (1968) 30

Rhode Island v. Innis, 446 U.S. 291 (1980) ... 37

Roberts v. United States, 445 U.S. 552 (1980) ... 36

Robinson v. California, 370 U.S. 660 (1962) .. 9, 10, 23

Rogers v. Richmond, 365 U.S. 534 (1961) 28

Rollerson v. United States, 343 F.2d 269 (D.C. Cir. 1964) 32, 34

Sas v. Maryland, 334 F.2d 506 (4th Cir. 1964), *on remand*, 295 F.Supp. 389 (D. Md. 1969), *aff'd sub nom. Tippett v. Maryland*, 436 F.2d 1153 (4th Cir. 1971), *cert. dismissed as improvidently granted sub nom. Murel v. Baltimore City Criminal Court*, 407 U.S. 355 (1972) 10, 15, 20, 25, 34

Schmerber v. California, 384 U.S. 757 (1966) .. 30, 31

Smith v. Francis, ____ U.S. ____, 106 S.Ct. 260, 88 L.Ed.2d 266 (1985) 9

Specht v. Patterson, 386 U.S. 605 (1967) 10, 13

State v. O'Neill, 274 Or. 49, 545 P.2d 97 (1976) .. 37, 38

State v. Whitlow, 45 N.J. 3, 210 A.2d 763 (1965) . 34

Taylor v. Best, 746 F.2d 220 (4th Cir. 1984) .. 33

Tehan v. United States ex rel. Shott, 382 U.S. 406 (1966) 27

Thornton v. Corcoran, 407 F.2d 695 (D.C. Cir. 1969) 37

Trop v. Dulles, 356 U.S. 86 (1958) (plurality opinion) 11

United States v. Albright, 388 F.2d 719 (4th Cir. 1968) 30, 34

United States v. Baird, 414 F.2d 700 (2d Cir. 1969), *cert. denied*, 396 U.S. 1005 (1970) 30

United States v. Byers, 740 F.2d 1104 (D.C. Cir. 1984) (en banc) 21, 33, 37, 38

United States ex rel. Gerchman v. Maroney, 355 F.2d 302 (3rd Cir. 1966) 13

United States v. Grunewald, 233 F.2d 556 (2d Cir. 1956), *rev'd*, 353 U.S. 391 (1957) 32

United States v. Mandujano, 425 U.S. 564 (1976) . 38

United States ex rel. Stachulak v. Coughlin, 520 F.2d 931 (7th Cir. 1975) 13

United States v. Wade, 388 U.S. 218 (1967) ... 37

United States v. Ward, 448 U.S. 242 (1980) ... 8, 11

Vitek v. Jones, 445 U.S. 480 (1980) 15

Williams v. Director, Patuxent Inst., 276 Md. 272, 347 A.2d 179 (Ct. App.), *cert. denied*, 425 U.S. 976 (1975) 19

Statutes and Regulations

7 Ill. Reg. 13496 (1983) 18

8 Ill. Reg. 14404 (1984) 18

8 Ill. Reg. 14501 (1984) 18

Ill. Rev. Stat. ch. 38, par. 105-1.01 (1981) ... 2, 11, 14, 24

Ill. Rev. Stat. ch. 38, par. 105-4 (1981) 26

Ill. Rev. Stat. ch. 38, par. 105-5 (1981) 16, 26, 27

Ill. Rev. Stat. ch. 38, par. 105-8 (1981) 17, 18

Ill. Rev. Stat. ch. 38, par. 105-9 (1963) 12

Ill. Rev. Stat. ch. 38, par. 105-9 (1973) 18

Ill. Rev. Stat. ch. 38, par. 105-9 (1981) 19

Ill. Rev. Stat. ch. 38, par. 105-10 (1981) 18, 24

Ill. Rev. Stat. ch. 38, par. 106-1 (1976) 19

Ill. Rev. Stat. ch. 38, par. 106-2 (1976) 19

Ill. Rev. Stat. ch. 38, par. 820, (1938) 12

Ill. Rev. Stat. ch. 38, par. 822.01 (1955) 12

Ill. Rev. Stat. ch. 91½, par. 1-119 (1979) 14, 15

Ill. Rev. Stat. ch. 111½, par. 6321 (1984) 13

Additional Authorities

Annot., 24 A.L.R.2d 350 (1952) 14

Annot., 34 A.L.R.3d 652 (1970) 14

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (3d ed. 1980) 11

Developments in the Law—Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190 (1974) 8, 13, 16, 39

Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267 (1975) 28

Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cin. L. Rev. 671 (1968) 31, 32, 33

McKay, *Self-Incrimination and the New Privacy*, 1967 Sup. Ct. Rev. 193 28

Model Penal Code (Proposed Official Draft 1962) .. 34

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BRIEF FOR RESPONDENT

OPINIONS AND JUDGMENTS BELOW

The decision of the Illinois Appellate Court, Third Judicial District, is reported in *People v. Allen*, 123 Ill.App.3d 669, 463 N.E.2d 135 (1984). A copy of the opinion has been included within the parties' joint appendix at pages 23-28. *Certiorari* was granted to review the decision of the Illinois Supreme Court in *People v. Allen*, 107 Ill.2d 91, 481 N.E.2d 690 (1985). A copy of that opinion may be found within the appendix at pages 41-52.

STATEMENT OF THE CASE

Petitioner Terry B. Allen was charged by bill of information in the Peoria County, Illinois circuit court for the crimes of deviate sexual assault and unlawful restraint of Christine Ray. The county state's attorney then petitioned the court to have Allen confined for psychiatric care pursuant to the Illinois Sexually Dangerous Persons Act, Ill. Rev. Stat. ch. 38, par. 105-1.01 to -12 (1981).[1] (J.A. 1-4). After a preliminary hearing on the information, at which the victim was not called to testify, the criminal charges were dismissed for want of probable cause. (J.A. 6; R. 8-12). Allen was then indicted for the same offenses and the petition was reinstated. (J.A. 7-8; R. C41).

When Allen and earlier appointed counsel were present in open court, the judge explained the procedure and rights under the Sexually Dangerous Persons Act. Allen indicated he understood the nature of those proceedings. Allen was then ordered to submit to two psychiatric examinations, and the names and addresses of the appointed physicians, as well as the dates and times of the scheduled examinations, were given to Allen and counsel in open court. (J.A. 5; R. 249-50, 261-62).

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[1] The Illinois legislature has defined a sexually dangerous person as a person "suffering from a mental disorder, which mental disorder has existed for a period of not less than one year, immediately prior to the filing of the petition hereinafter provided for, coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities towards acts of sexual assault or acts of sexual molestation of children". Ill. Rev. Stat. ch. 38, par. 105-1.01 (1981).

Counsel did not attend those examinations, but one of the evaluating psychiatrists nevertheless "made sure that he [Allen] understood what the consequences were" before he began the examination. (J.A. 36; R. 251). Dr. Beck explained his role as court-appointed examiner rather than as personal physician, and Beck warned Allen that any disclosures could be reported to the court and counsel. (J.A. 36; R. 126-27). Beck found Allen to be "very cooperative" and concluded that Allen "wanted to be found sexually dangerous and did so because he felt it was a better alternative than a trial trying to be found not guilty". (J.A. 36-37). Dr. Colen similarly noted that Allen "wanted to be hospitalized to get help". (J.A. 34).

The psychiatrists conducted organic mental testing and mental status evaluations in their private offices to examine Allen's personal appearance, speech patterns, thought processes, hallucinations and delusions, emotional state, appetite and sleep disturbances, self-destructive tendencies, memory, concentration, orientation to time and place, ability to make calculations and to engage in abstract thought, judgment, and personal insight. (R. 85, 95-96, 126, 128). Family, medical, educational, employment and military histories were also solicited from Allen. (J.A. 33, 37). Finally, prior psychiatric hospitalizations and drug and alcohol usage were noted. (J.A. 33-34, 37-38). Allen reported psychotic auditory hallucinations and suicidal desires. He was diagnosed as psychotic, or "out of touch with reality", and suffering from a schizophrenia characterized by aggressive and abnormal behavior. (J.A. 34-35, 39; R. 96, 99, 101, 103, 130, 137-38).

Allen disclosed that he had engaged in forcible, deviant sexual behavior during street encounters since the age of ten. He acknowledged the same behavior with Christine Ray. Allen said he couldn't "stop this stuff". (J.A. 33, 37;

R. 131). Allen did not file a pre-hearing suppression motion or motion *in limine* to voice a constitutional objection to use of his statements at the hearing. At the bench hearing on the petition, however, these psychiatrists were allowed over defense objection to express only their medical opinions formulated from these interviews; Allen's statements were not permitted as evidence. (R. 89-90).

When called as the State's third witness, twenty-one year old Christine Ray related the events of October 11, 1982. Ray was a McDonald's waitress who had spoken to Allen inside the restaurant. (R. 144). After completing her duties, Ray entered her unlocked automobile to drive home. Allen, who had been concealed in the backseat, appeared and demanded in a "threatening" tone of voice that she drive him "to a romantic place—or else". (R. 145-46). At Allen's direction, Ray drove to the airport parking lot where Allen attempted intercourse with the clothed victim. He also forced her to perform fellatio. (R. 149-51, 153). Allen was arrested two days later when he returned to the same restaurant. (R. 158).

Allen did not testify or offer other evidence at the hearing. After finding Allen to be a sexually dangerous person, the circuit court judge ordered Allen's indeterminate confinement at the Menard Psychiatric Center. (J.A. 11). No subsequent attempt was made to pursue criminal prosecution on the indictment.

On direct appeal, a divided intermediate state appellate court reversed the finding upon the authority of *Estelle v. Smith*, 451 U.S. 454 (1981). *People v. Allen*, 123 Ill. App.3d 669, 463 N.E.2d 135 (1984). In its subsequent unanimous opinion, the Illinois Supreme Court concluded that the fifth amendment privilege does not insulate disclosures used to adjudicate a person's civil status as a

sexually dangerous person. Relying in part on this Court's decision in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the court considered Allen's liberty interest but concluded that the state's legitimate treatment purpose outweighed the minimal value of the privilege as a protection against erroneous decisionmaking. *People v. Allen*, 107 Ill.2d 91, 102, 481 N.E.2d 690 (1985). Statements made during forensic evaluations may not be used as evidence in any subsequent criminal prosecution, however. 107 Ill.2d at 104.

Petitioner obtained *certiorari* review of that decision on November 12, 1985.

SUMMARY OF ARGUMENT

I. The fifth amendment privilege against compulsory self-incrimination, enforceable against the states by incorporation into the fourteenth amendment due process clause, does not insulate disclosures offered as evidence in proceedings under the Illinois Sexually Dangerous Persons Act. Although the privilege may be claimed in any proceeding, the privilege does not offer any shield against civil liability. Proof of a respondent's mental disorder, dismissal of the pending criminal charge, and subsequent psychiatric care sufficiently distinguish these civil proceedings from the criminal trial for which the privilege was designed. Full protection of the respondent's fifth amendment privilege has been provided by immunity from subsequent criminal prosecution.

A. Announced legislative intent, legislative history, and the actual operation of the Act reveal a civil, mental

health commitment alternative to criminal prosecution. After the government proves a respondent's mental disorder and a demonstrated propensity to engage in certain types of sexual activity, the respondent is confined in a special mental health facility where he receives psychiatric care and regular progress evaluations until recovery is achieved. The pending criminal charge is dismissed, and statements to examining psychiatrists cannot be used to establish guilt in any future criminal prosecution. The Act accordingly provides an opportunity for psychiatric care in lieu of criminal prosecution.

B. Although the liberty deprivation associated with involuntary mental health commitment implicates the fourteenth amendment due process clause, the privilege is not required to assure fundamental procedural fairness in these proceedings. An individual's loss of personal freedom, and the possible stigma arising from adjudication, do not outweigh the state's compelling interest in providing psychiatric care to dangerous, mentally ill persons.

C. Extension of the fifth amendment to these proceedings would not promote the values which the privilege historically was designed to serve. In a medico-legal proceeding in which false disclosures have an independent clinical significance, the privilege is not needed to assure truthfulness of statement content. Indeed, Petitioner Allen neither alleged coercive practices nor claimed that his statements were in any way untrustworthy. Equally important, the desire to maintain a fair state/individual balance must yield when the State's access to the most reliable evidence of a respondent's mental state is threatened.

D. The fifth amendment privilege is the one procedural safeguard most likely to work a serious debilitating effect on these proceedings. Any right to silence would imper-

missibly deny the State the use of crucial evidence of respondent's mental state, thwart the diagnostic and treatment purposes of the proceeding, and thereby force the state to abandon any benefits of this mental health commitment alternative to criminal prosecution.

II. Even if the fifth amendment exclusionary rule extends to these proceedings, examining psychiatrists are not required to give *Miranda v. Arizona*, 384 U.S. 436 (1966) admonitions before forensic evaluations. In the context of these proceedings, the privilege is not self-executing and must be claimed during the examination. Equally important, Petitioner Allen, represented by counsel, affirmatively knew that his disclosures would be used to adjudicate his status as a sexually dangerous person.

ARGUMENT

I.

THE ILLINOIS SEXUALLY DANGEROUS PERSONS ACT PROVIDES A CIVIL, INVOLUNTARY COMMITMENT ALTERNATIVE TO CRIMINAL PROSECUTION TO WHICH THE FIFTH AMENDMENT PRIVILEGE DOES NOT APPLY.

The fifth amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any *criminal case* to be a witness against himself. . ." (emphasis supplied). Respondent recognizes that the privilege may be claimed in any proceeding. Moreover, when assessing the availability of the privilege in a proceeding, it is appropriate to consider "the nature of the statement or admission and the *exposure which it invites*". *In Re Gault*, 387 U.S. 1, 49 (1967) (emphasis supplied), as reaffirmed

in *Estelle v. Smith*, 451 U.S. 454, 462 (1981). However, the privilege does not offer any protection against potential "exposure" to civil liability. *See, e.g., Gardner v. Broderick*, 392 U.S. 273, 278 (1968). As a result, the applicability of the privilege depends upon whether the government proceedings to which the declarant would be exposed are, in effect, "civil" or "criminal". *United States v. Ward*, 448 U.S. 242, 248 (1980); *Middendorf v. Henry*, 425 U.S. 25, 34 (1976). *See also Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963) (enumerating relevant distinguishing factors); *Developments in the Law-Civil Commitment of the Mentally Ill*, 87 Harv. L. Rev. 1190, 1261-64 (1974) [hereinafter cited as "Developments"] (concluding that police power mental health commitments are civil proceedings to which the fifth amendment privilege does not extend).

In Argument I.A, Respondent will consider whether a proceeding under the Illinois Sexually Dangerous Persons Act, Ill. Rev. Stat. ch. 38, par. 105-1.01 to -12, ("the Act") is a "criminal case" within the meaning of the fifth amendment. Respondent will demonstrate that proceedings under the Act are essentially civil involuntary commitment procedures. Persons subjected to psychiatric examinations pursuant to the Act enjoy immunity from any criminal prosecution arising from statements made during such examinations. As a result, the fifth amendment privilege did not extend to proof of Petitioner Allen's status as a sexually dangerous person.

Argument I.B addresses the suggestion that the fifth amendment privilege is an element of the fourteenth amendment due process clause which must be applied to any proceedings under the Act. Argument I.C determines whether the values reflected by the fifth amendment will

be furthered by application of the privilege to proceedings under the Act. Argument I.D examines how the societal purposes of the Act would be affected by rigid application of the privilege in these circumstances.

Respondent notes that, although neither petitioner nor *amici* urge directly that the Act is a "criminal" legislative enactment, Petitioner and *amici* do insist that the Act is so closely akin to a criminal prosecution in its procedures that it must be viewed as the functional equivalent of a criminal prosecution to require application of the fifth amendment privilege.[2] The Illinois Supreme Court, in contrast, expressly considered the treatment purpose of the Act and concluded that "the legislative determination that the proceedings are civil in nature . . . is eminently reasonable". *People v. Allen*, 107 Ill.2d 91, 100-101, 481 N.E.2d 690 (1985) (citation deleted). Respondent urges that this construction by the Illinois Supreme Court is correct; the statute provides for compulsory psychiatric care of persons suffering from a "mental disorder", thereby creating a meaningful distinction from, and a civil involuntary commitment alternative to, criminal prosecution of sexually dangerous persons.

Respondent further believes it helpful to note that, whatever their differences about the operation of the Act itself, all parties and *amici* apparently agree that tradi-

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[2] Although no challenge to the constitutionality of any Illinois statute has been presented, Allen contends that the fifth amendment privilege is required because the Act essentially visits punishment on the mentally ill, sexually dangerous person. (Pet. Br. 37-38). As a result, petitioner posits an unconstitutional result and then seeks to shroud it with procedural safeguards. *See Robinson v. California*, 370 U.S. 660 (1962) and *Smith v. Francis*, ____ U.S. ____, 106 S.Ct. 260, 88 L.Ed.2d 266 (1985) (Marshall, J., dissenting).

tional mental health commitment proceedings are civil actions to which the fifth amendment exclusionary rule does not apply. In the words of this Court in *Addington v. Texas*, 441 U.S. 418, 428 (1979), "a civil commitment proceeding can in no sense be equated to a criminal prosecution". *Accord*, *French v. Blackburn*, 428 F.Supp. 1351 (M.D.N.C. 1977), *aff'd mem.*, 443 U.S. 901 (1979). In *McNeil v. Director, Patuxent Inst.*, 407 U.S. 245, 250 (1972), this Court reviewed a similar Maryland defective delinquent statute but was not required to resolve the fifth amendment question. The civil nature of those proceedings has been recognized, however. *Sas v. Maryland*, 334 F.2d 506 (4th Cir. 1964), *on remand*, 295 F.Supp. 389 (D. Md. 1969), *aff'd sub nom. Tippett v. Maryland*, 436 F.2d 1153, 1157 (4th Cir. 1971), *cert. dismissed as improvidently granted sub nom. Murel v. Baltimore City Criminal Court*, 407 U.S. 355 (1972). In a similar manner, this Court did not consider the availability of the privilege in Minnesota sexual "Psychopathic Personalities" hearings, *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940), although the Court later noted the civil commitment nature of those proceedings in *Specht v. Patterson*, 386 U.S. 605, 610, n.3 (1967). Finally, in *Robinson v. California*, 370 U.S. at 664-65, this Court apparently recognized the civil nature of a compulsory treatment program which included involuntary confinement of narcotics addicts. Against this background of relevant precedent, then, this Court must now examine the distinctive character of the Illinois legislation.

A. In Both Purpose And Effect, The Act Provides A Medico-Legal Inquiry After Which Persons Suffering From Mental Disorders Are Committed For Psychiatric Care.

A particular proceeding will be deemed criminal only if the state's interest therein is clearly punitive, *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion), and the constitutional restrictions associated with a criminal prosecution are not required if an alternative, non-punitive purpose "may rationally be assigned" to questioned legislation. *Mahler v. Eby*, 264 U.S. 32, 39 (1924); *Mendoza-Martinez*, 372 U.S. at 168-69 (determining applicability of the fifth amendment). To ascertain the purpose of a particular enactment, this Court traditionally begins with an examination of legislative intent. Where, as here, the framers of a statute expressly denominate it to be "civil", this Court will disregard that description only upon the "clearest proof" that the statute is essentially penal in purpose or effect. *Ward*, 448 U.S. at 249 (citation deleted).

State court construction of the Act reveals critical differences between sexually dangerous persons proceedings and criminal prosecutions. The Illinois Sexually Dangerous Persons Act embodies a legislative judgment to provide an enlightened medical approach to the problem of the sexual psychopath or other mentally ill person with demonstrated sexual propensities.[3] *People v. Whitney*, 33 Ill.

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[3] Because Ill. Rev. Stat. ch. 38, par. 105-1.01 (1981) refers to "all persons suffering from a mental disorder", an S.D.P. respondent with demonstrated sexual propensities apparently need not exhibit signs of the more narrowly defined "psychosexual disorders" found within the American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 261-83 (3d ed. 1980) to receive psychiatric care. Respondent Allen, for example, was diagnosed as being schizophrenic. (R. 137).

App.3d 729, 735, 338 N.E.2d 233 (1975). Originally enacted in 1938 as the Criminal Sexual Psychopathic Persons Act, the initial legislation supplemented other civil commitment provisions to provide psychiatric care for criminal defendants "not insane" but nevertheless unfit for prosecution. The respondent was ordered to stand trial upon recovery. Ill. Rev. Stat. ch. 38, par. 820 (1938) and *People v. Sims*, 382 Ill. 472, 474, 47 N.E.2d 703 (1943). The sole object of those proceedings was to "ascertain the mental condition of the accused"; the hearing played "no part of the criminal proceedings" and had "no connection with his guilt or innocence". *People v. Redlich*, 402 Ill. 270, 276, 83 N.E.2d 736 (1949). As a result, the Illinois courts consistently recognized the civil nature of the earlier proceeding. *See, e.g., Sims*, 382 Ill. at 477.

Subsequent legislative revision deleted the word "criminal" from the title of the Act, adopted the present Sexually Dangerous Persons title, and added a provision to codify prior judicial opinion that the proceedings are "*civil in nature*". Ill. Rev. Stat. ch. 38, par. 822.01 (1955) and *People v. Fish*, 36 Ill.2d 220, 222-23, 221 N.E.2d 637 (1966) (emphasis supplied). Equally important, the mental disorder element was retained, and a new provision was added requiring the local prosecutor to quash any outstanding indictment related to the petition at the time of the respondent's recovery and discharge. Ill. Rev. Stat. ch. 38, par. 105-9 (1963); *People v. Burkhart*, 116 Ill.App. 3d 708, 711, 452 N.E.2d 375 (1983); *Whitney*, 33 Ill.App.3d at 735. The government must now elect between a criminal prosecution and a sexually dangerous persons proceeding. *People v. Patch*, 9 Ill.App.3d 134, 138, 293 N.E.2d 361 (1973). Alternatively stated, the Act now provides for treatment in lieu of prosecution. *United States ex rel.*

Stachulak v. Coughlin, 520 F.2d 931, 933 (7th Cir. 1975); *Allen*, 107 Ill.2d at 105; *Burkhart*, 116 Ill.App.3d at 716 (dissenting opinion). *Cf. People v. Sansone*, 18 Ill.App.3d 315, 326, 309 N.E.2d 733 (1974) (viewing both mental health commitment and sexually dangerous persons proceedings as alternatives to prosecution).[4]

Illinois courts construing the present Act have accordingly proclaimed the non-criminal nature of the proceeding in the strongest possible terms. *See, e.g., Allen*, 107 Ill.2d at 100-101; *People v. Shiro*, 52 Ill.2d 279, 283, 287 N.E.2d 708 (1972). *Accord Gomes*, 471 F.2d at 797 (rejecting double jeopardy claim in a Massachusetts Sexually Dangerous Persons proceeding); *Cross v. Harris*, 418 F.2d 1095, 1109 (D.C. Cir. 1969) (separate opinion of Burger,

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[4] State legislatures have extended the same opportunity for treatment in lieu of prosecution in a variety of other contexts as well. *See, e.g.*, Ill. Rev. Stat. ch. 111½, par. 6321 (1984) which offers treatment for eligible drug addicts.

Respondent expresses no view concerning the availability of the privilege in proceedings that provide treatment in lieu of sentence following criminal conviction. *See, e.g.*, Petitioner's cited authority, *United States ex rel. Gerchman v. Maroney*, 355 F.2d 302 (3rd Cir. 1966) (construing a former state law which provided an alternative sentence for dangerous sex offenders who were not mentally ill). *See also McNeil*, 407 U.S. at 247 (indefinite commitment of defective delinquent in lieu of conventional sentence); *Baxstrom v. Herold*, 383 U.S. 107 (1966) (treatment after expiration of criminal sentence); *Humphrey v. Cady*, 405 U.S. 504 (1972); and *Specht*, 386 U.S. at 607 (treatment in lieu of sentence). *But see Hollis v. Smith*, 571 F.2d 685 (2d Cir. 1978) (refusing privilege for indeterminate sentencing provision of New York Sex Offenders Law) and *Gomes v. Gaughan*, 471 F.2d 794 (1st Cir. 1973) (no right to counsel before sixty day commitment as a Sexually Dangerous Person in lieu of sentence). Statutes which do not require proof of mental illness are equally dissimilar. *See, e.g., Millard v. Harris*, 406 F.2d 964 (D.C. Cir. 1968) (construing Sexual Psychopath Act). These distinctions are further explored in *Developments*, *supra*, at 1264, n. 340.

J.) (recognizing nonpenal nature of the District of Columbia Sexual Psychopaths Act); *Commonwealth v. Barboza*, 387 Mass. 105, 438 N.E.2d 1064, 1069-71, *cert. denied*, 459 U.S. 1020 (1982) (rejecting fifth amendment privilege, right to jury trial, and double jeopardy claim in a civil Sexually Dangerous Persons proceeding) and *People v. Chapman*, 301 Mich. 584, 4 N.W.2d 18, 26 (1942) (declining to extend the state constitutional privilege against self-incrimination to a civil Criminal Sexual Psychopathic Persons proceeding).[5]

The actual operation and effect of the Act are equally significant. Petitioner seeks to find indicia of a "criminal case" in required proof of a criminal propensity for acts of sexual assault or sexual molestation of children. Ill. Rev. Stat. ch. 38, par. 105-1.01 (1981). Alternatively stated, the Act requires that the mentally ill respondent be sexually "dangerous". These additional elements only serve to define the sexually aberrant nature of the mental disorder, however; the Act required proof that Allen's mental illness manifested itself in sexual conduct. The larger class of mentally ill persons for whom civil confinement and treatment may be ordered has been limited. *Cf. People v. Pembrock*, 62 Ill.2d 317, 322, 342 N.E.2d 28 (1976) and *Pearson*, 309 U.S. at 275 (rejecting equal protection challenges). *See also Sims*, 382 Ill. at 476 (finding a reasonable legislative basis for the classification).[6]

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[5] A complete survey of state sexually dangerous persons statutes is found in Annot., 24 A.L.R.2d 350 (1952) and 34 A.L.R.3d 652 (1970).

[6] In this connection, it is noteworthy that the Act may be used to obtain treatment for persons suffering from mental disorders who are indeed "dangerous" but who are not "reasonably expected to inflict serious physical harm upon . . . another *in the near future*" for commitment under Ill. Rev. Stat. ch. 91½, par. 1-119(1) (1979) (emphasis supplied).

Equally significant, the State in these proceedings proves a proclivity, rather than an isolated act of transgression with its own *scienter* requirement. *Allen*, 107 Ill.2d at 105; *Mendoza-Martinez*, 372 U.S. at 168. Although a criminal charge prompts the filing of a commitment petition, the prosecutor need not necessarily prove the specific underlying criminal charge to sustain his burden of proof under the Act. Ill. Rev. Stat. ch. 38, par. 105-3 (1981). Simply stated, the proceeding does not resolve specific factual issues of guilt or innocence. *People v. Capoldi*, 10 Ill.2d 261, 266, 139 N.E.2d 776 (1957); *People v. Pygott*, 64 Ill. App.2d 284, 290-91, 211 N.E.2d 382 (1965). *Accord French*, 428 F.Supp. at 1359 (rejecting fifth amendment privilege for civil commitment proceedings for this reason); *Tippett*, 436 F.2d at 1157 (similarly rejecting privilege for defective delinquent proceedings). *Cf. McKeiver v. Pennsylvania*, 403 U.S. 528, 551-53 (1971) (White, J., concurring) (noting the same difference in substance between the criminal and juvenile courts). As this Court has already observed, "[w]hether the individual is mentally ill and dangerous . . . turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists". *Addington*, 441 U.S. at 429 (emphasis in original). *See also Vitek v. Jones*, 445 U.S. 480, 498 (Powell, J., concurring) (examining medical decision to transfer a prisoner to a mental hospital).

In this connection, Respondent rejects the suggestion that this required "dangerousness" finding will *ipso facto* transform an otherwise civil proceeding into a criminal prosecution. This argument simply proves too much. Most states now require or permit a finding of danger to others for involuntary mental health commitments. *See, e.g.*, Ill. Rev. Stat. ch. 91½, par. 1-119 (1979) and *Sansone*, 18 Ill. App.3d at 322. Indeed, a dangerousness finding may be

constitutionally required for at least a postconviction proceeding. *Humphrey*, 405 U.S. at 509. *See also O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975). Under petitioner's reasoning, however, involuntary mental health commitment proceedings must then be "criminal" in nature for the fifth amendment. *But see Addington*, 441 U.S. at 428.[7]

Finally, Respondent recognizes that proof of a *demonstrated* propensity is needed. As the Illinois Supreme Court observed, confinement should not be ordered on mere psychological speculation. 107 Ill.2d at 105. This requirement of an overt act may have been included to protect the statute against preventive detention claims. *See, e.g., Cross*, 418 F.2d at 1099-1100. If, as petitioner suggests, evidence of an overt act renders the statute sufficiently "criminal" for application of the fifth amendment, then Respondent notes the unfortunate and ironic result that a provision intended to assure a valid civil commitment statute has become the very ground for its demise as a criminal prosecution alternative.

To prove future dangerousness, the State may introduce evidence of a respondent's past crimes or convictions. Ill. Rev. Stat. ch. 38, par. 105-5 (1981); *Burkhart*, 116 Ill. App.3d at 713. However, this antecedent conduct is received to show the respondent's mental condition and to predict future behavior, rather than to punish past mis-

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[7] The fact that a state, in a valid exercise of its police power, may supplement *parens patriae* concerns with measures to protect the welfare and safety of other citizens does not render a statute "punitive" for the fifth amendment. (Pet. Br. 27). This suggestion is carefully considered and rejected in *Developments*, *supra*, at 1306. The *parens patriae* concern for petitioner's danger to himself should not be overlooked in this particular case, however, because Terry Allen was suicidal before commitment. (J.A. 34).

deeds. *People v. Sly*, 82 Ill.App.3d 742, 747, 403 N.E.2d 72 (1980); *Allen*, 107 Ill.2d at 105. *Accord Pearson*, 309 U.S. at 274 (approving "evidence of past conduct [as] pointing to probable consequences" in a Minnesota Psychopathic Persons proceeding); *In Re Field*, 120 N.H. 206, 412 A.2d 1032, 1033-34 (N.H. Sup. Ct. 1980) (rejecting claim of privilege in a mental health commitment proceeding for this reason); and *Chapman*, 4 N.W.2d at 25 (rejecting *ex post facto* claim in this connection).

If the State establishes its case, then the sexually dangerous person is committed for an indeterminate period of time to the Menard Psychiatric Center in Chester, Illinois. Contrary to the suggestion of *amici*, the statutory requirement that the respondent be confined "until the person has recovered" reflects the civil treatment, rather than a criminal retributive, purpose of the Act. Ill. Rev. Stat. ch. 38, 105-8 (1981); *Mendoza-Martinez*, 372 U.S. at 168. In contrast to a fixed term penal sentence, confinement under the Act is for the indeterminate period of time needed for a person to respond to therapy and to achieve recovery. *Sly*, 82 Ill.App.3d at 748-49. *Cf. Overholser v. Lynch*, 288 F.2d 388, 393 (D.C. Cir. 1061) (en banc), *rev'd on other grounds*, 369 U.S. 705 (1962) (hospitalization of a person acquitted by reason of insanity must necessarily be for an indefinite term to be effective); *Humphrey*, 405 U.S. at 511 (analogizing indeterminate commitment under the Wisconsin Sex Crimes Act to a mental health commitment proceeding for equal protection scrutiny); and *Cross*, 418 F.2d at 1109 (Burger, J., dissenting) (necessity of therapy justifies disparate length of confinement after a non-penal adjudication as a sexual psychopath).

The sexually dangerous person has a right to treatment in a separate facility designed to provide psychiatric care.

Ill. Rev. Stat. ch. 38, par. 105-8 (1981); *Shiro*, 52 Ill.2d at 283; *Whitney*, 33 Ill.App.3d at 735. The Menard Psychiatric Center is a "specialized mental health setting", defined as a facility which specializes in mental health care. 8 Ill. Reg. 14404 (1984). Although operated under the administrative aegis of the Illinois Department of Corrections, the Menard Psychiatric Center is a facility entirely separate from any correctional center or prison. 7 Ill. Reg. 13496 (1983); *People v. Lindsey*, 45 Ill.2d 115, 117, 256 N.E.2d 808 (1970). Sexually dangerous persons committed to Menard may not be transferred or placed within the criminal population. *Shiro*, 52 Ill.2d at 283. The various types of individualized therapy and counselling provided the sexually dangerous person are described within the appendix to the Brief for Mandel Legal Aid Clinic as *amicus curiae* at A-2. The progress of persons confined at Menard is reviewed at least every six months by a staff psychiatrist, with copies of his report sent to court and counsel, although a request for a review hearing may be made at any time. 8 Ill. Reg. 14501 (1984) and Brief for *amicus* Mandel Legal Aid Clinic at A-3. The committee may also petition the circuit court for absolute or conditional release at any time under Ill. Rev. Stat. ch. 38, par. 105-9 (1973) or seek a writ of habeas corpus.

The sexually dangerous person need not be cured to be released; the respondent must be absolutely discharged as soon as he is no longer dangerous. A conditional discharge is also available when recovery cannot be determined under conditions of institutional care. Ill. Rev. Stat. ch. 38, par. 105-10 (1981); *People v. Studdard*, 51 Ill.2d 180, 194, 281 N.E.2d 678 (1972); *Burkhart*, 116 Ill.App.3d at 714; *Sly*, 82 Ill.App.3d at 746.

Finally, and perhaps most significantly, a respondent's disclosures cannot be used to establish guilt in any subsequent criminal prosecution.[8] The Act prohibits prosecution for the incident which prompted the filing of the petition. Ill. Rev. Stat. ch. 38, par. 105-9 (1981). Moreover, the Illinois Supreme Court has recognized a judicially created use restriction whereby statements cannot be used to prosecute the mentally ill respondent for other crimes which he may divulge. *Allen*, 107 Ill.2d at 104. *See generally California v. Byers*, 402 U.S. 424 (1971) and *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 (1963). *Compare* Ill. Rev. Stat. ch. 38, pars. 106-1 and 106-2 (1976) (providing transactional immunity) *with Kastigar v. United States*, 406 U.S. 441, 453 (1972) (finding a lesser use and derivative use immunity is co-extensive with the constitutional privilege). As a result, the state may require testimony even over respondent's constitutional objection. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). *See also Estelle v. Smith*, 451 U.S. at 468-69. Sufficient protection may already have been provided by the fifth amendment exclusionary rule itself. *Adams v. Maryland*, 347 U.S. 179, 181 (1954). With the protection of that rule, supplemented by the use restriction mandated by the Illinois Supreme Court and the immunity provisions provided by statute, a respondent's fifth amendment privilege is entirely safeguarded. *Williams v. Director, Patuxent Inst.*, 276 Md. 272, 347 A.2d 179, 191 (Ct. App.), *cert. denied*, 425 U.S. 976 (1975).

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[8] Respondent parenthetically observes that twenty-three year old Allen's description of juvenile sexual activity was not "clearly inculpatory" or evidence constituting "potential links in a chain of evidence" for future prosecution. *See generally California v. Byers*, 402 U.S. 424, 428 (1971).

In summary, Respondent agrees with the conclusion of the Fourth Circuit Court of Appeals in a related area that "the denomination of the proceedings as civil rather than criminal is not a semantic exercise but a factual description of what occurs". *Tippett*, 436 F.2d at 1157. The Illinois Sexually Dangerous Persons Act contemplates a medico-legal inquiry into the existence of a possible mental disorder. Confinement for psychiatric treatment of that mental illness and indictment dismissal follow an adjudication. The Illinois respondent is entitled to treatment, periodic review of his condition, and release when he is no longer dangerous. *See Addington*, 441 U.S. at 429, n.4. Here, as in the mental health proceedings reviewed in *Addington*, state power is not exercised in a punitive sense. *Id.* at 428. The terms of the Act, measured against its legislative history and relevant constitutional precedent, define a civil involuntary commitment proceeding.

B. The Fourteenth Amendment Due Process Clause Does Not Require A Privilege Against Self-Incrimination To Assure Fundamental Procedural Fairness In Sexually Dangerous Persons Proceedings.

Even if the Illinois proceeding is not a "criminal case" for the purpose of the fifth amendment, the question remains whether Allen was entitled, as a matter of fundamental procedural fairness, to protection under the broader contours of the fourteenth amendment due process clause. Arguing from *In Re Gault* and *Estelle v. Smith*, petitioner and *amici* conclude that both the "exposure" of a liberty deprivation and conditions of confinement compel recognition of the fifth amendment privilege. Yet those two decisions, while providing a proper conceptual starting point, merely restate the unquestioned proposition that the privilege offers a shield against criminal liability.

Neither decision requires the conclusion that the privilege extends to mental health proceedings.

As the *Addington* decision alone reveals, this Court has not equated juvenile delinquency proceedings with involuntary commitment hearings. The focus of this Court's concern in *Gault*, as supplemented by *In Re Winship*, 397 U.S. 358 (1970), was violation of state penal law, factual guilt, and possible transfer to the adult court of general jurisdiction which results in incarceration with adult felons. *Gault*, 387 U.S. at 50-51; *Addington*, 441 U.S. at 427-28. Indeed, the *Winship* Court refrained from expressing any view concerning proof of juvenile status offenses. 397 U.S. at 359, n.1. Procedural orderliness to discourage arbitrary factfinding was also an important concern in the juvenile proceedings reviewed therein. *Gault*, 387 U.S. at 18. For all these reasons, Respondent agrees that criminal trial safeguards were properly ordered in *Gault* and *Winship*.

The *Smith* decision is similarly inapposite to the present case. Ernest Smith's statements were used to establish a predicate element of proof under Texas law to obtain the death penalty. Proof of mental status has apparently been distinguished and exempted from the fifth amendment prohibition, however. *See Smith*, 451 U.S. at 465, as construed in *United States v. Byers*, 740 F.2d 1104, 1110-11 (D.C. Cir. 1984) (en banc) (*Smith* deemed inapplicable to sanity inquiries). Another possible distinction is suggested by the dissenting opinion in *Barefoot v. Estelle*, 463 U.S. 880, 913-14 (1983) (greater procedural safeguards are required in capital cases).

Although neither the *Gault* nor *Smith* decision controls the present inquiry, Respondent recognizes that a finding of sexual dangerousness will work a liberty deprivation,

and that the due process clause is accordingly implicated here. *Pearson*, 309 U.S. at 276-77; *Addington*, 441 U.S. at 425. However, the genuine issue is one of the *measure* of process that is constitutionally due the mentally ill respondent; the fourteenth amendment requires only the essentials of due process and fair treatment. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). In the words of this Court in *Patterson v. New York*, 432 U.S. 197, 208 (1977), "[d]ue process does not require that every conceivable step be taken, at whatever cost". Nor will the "fundamental" importance of the privilege alone require its application in every context. *Compare Malloy v. Hogan*, 378 U.S. 1 (1964) *with Minnesota v. Murphy*, 465 U.S. 420, ____, n.7, 104 S.Ct. 1136, 1147, n.7, 79 L.Ed.2d 409, 424-25, n.7 (1984) (the privilege is not indispensable to a fair probation revocation hearing); *and Duncan v. Louisiana*, 391 U.S. 145 (1968) *with McKeiver*, 403 U.S. at 540-41 (1971) (no right to jury determination of juvenile delinquency). *See also Parham v. J.R.*, 442 U.S. 584, 609 (1979) (the full judicial model is inappropriate in medical inquiries).

As the Illinois Supreme Court observed, a due process inquiry requires an accommodation of competing interests; this Court must weigh the individual's interest in his continued liberty and his good name against the state's legitimate interest in identifying and treating, by involuntary commitment if necessary, those citizens suffering from serious mental illness who are dangerous to themselves and others. *Morrissey*, 408 U.S. at 481. The key to resolving the tension of competing interests here is "the probable value, if any, of [an] additional . . . procedural safeguard". *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Respondent asserts that extension of the privilege to these proceedings would not protect the societal values which the privilege historically was designed to serve.

Equally serious, a right of silence, the one protection most likely to defeat the diagnostic and treatment purposes of the Act, would hinder effectuation of legitimate state goals in a manner never countenanced by this Court. *Compare Winship*, 397 U.S. at 366-67 *with McKeiver*, 403 U.S. at 547.

Respondent begins by addressing the background argument of Petitioner, in which the American Psychiatric Association joins as *amicus curiae*, that the state's treatment purpose is only an illusion of benevolence. Their argument, spun from *Gault*, may be summarized in the following manner: because past rehabilitative efforts have been disappointing,[9] the sexually dangerous persons proceeding is essentially punitive. For this reason, attributes of the adversarial process should be applied, even if the state's diagnostic and treatment goals will thereby be impaired. Respondent respectfully submits that this argument comes dangerously close to suggesting that involuntary commitment alternatives should be abandoned to return the sexually dangerous person to the criminal process. *But see Robinson v. California*, 370 U.S. 660 (1962) and *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

In this connection, Respondent disagrees with two fundamental premises of *amicus curiae*. First, the Associa-

[9] This factual predicate to their argument is simply not supported by the available evidence. The Supervising Psychologist of the Menard Psychiatric Center, Dr. Michael J. Dolan, issued a statistical report in April, 1983 which noted that of the thirty-six persons who were released from the Menard facility following treatment as Sexually Dangerous Persons, only six (or about 17%) became recidivist sexual offenders. Respondent requests that this Court take judicial notice of this data, which is excerpted in the Appendix to this Brief; ten copies of the complete statistical study prepared by Dr. Dolan have been lodged with the Clerk of this Court.

tion suggests that psychotherapy rarely benefits the non-psychotic sexual offender. Whether this be true or not, this argument simply does not apply to the Illinois legislation. Only persons suffering from demonstrated mental disorders may be declared sexually dangerous persons. Ill. Rev. Stat. ch. 38, par. 105-1.01 (1981). Petitioner Allen, for example, was diagnosed as schizophrenic. The Association agrees that treatment is successful when signs of pathology are present, however. (Br. 17).

Secondly, the Association admits there are conflicting views concerning the efficacy of treatment. (Br. 17-18). For an extensive review of the medical literature recognizing successful treatment methodologies, see *Millard v. Harris*, 406 F.2d at 982-84. This Court has confronted the difficulties presented by divergent psychiatric opinion before. *Barefoot*, 463 U.S. at 899-903.[10] In this connection, it should also be remembered that the sexually dangerous person in Illinois need not be cured to be released. Ill. Rev. Stat. ch. 38, par. 105-10 (1981). Unless this Court is presently able to conclude from mixed professional opinion that no beneficial treatment can ever be given to any mentally ill, sexually dangerous person in any context, then this Court may properly defer to state legislative judgment here. The judiciary should not be called to umpire medical disputes; this argument is properly addressed to the state legislature which enjoys broad investigatory powers to conduct additional inquiry. *See Cross*, 418 F.2d at 1109 (Burger, J., concurring and dis-

[10] The present case presents a particular irony. Despite alleged uncertainty concerning the efficacy of treatment, petitioner could claim a substantive due process right to the uncertain results of that treatment. *See, e.g., Donaldson v. O'Connor*, 403 F.2d 507 (1974), *vacated on other grounds*, 422 U.S. 563 (1975).

senting in part). The effective end of the treatment goal should not be ordered, particularly at a time when the rehabilitative goals of the correctional process have also been sharply criticized. *Sas*, 334 F.2d at 514. In the words of Mr. Chief Justice Burger in *Winship*, we must not "burn down the stable to get rid of the mice". 397 U.S. at 376. Similar views were expressed in the majority opinion in *McKeiver*, 403 U.S. at 547, and in the remarks of Justices White and Brennan in their separate opinions therein. *Id.* at 553, 555.

Next, it is helpful to place Petitioner's legitimate interests in proper perspective. Petitioner and *amici* urge that the stigma attached to an adjudication requires the extension of the privilege. Reputation alone is not a constitutionally protected interest, however. *Paul v. Davis*, 424 U.S. 693, 701 (1976). Moreover, this Court has recently rejected this very argument as a proposed justification for requiring a pre-commitment judicial hearing. *Parham*, 442 U.S. at 600-601 (holding that a greater social ostracism may well arise from the untreated mental illness).

A more important concern is presented by Petitioner's interest in his personal freedom. Arguing from *Gault*, Petitioner has emphasized the liberty interest to contend that he was entitled to a "full panoply" of criminal trial safeguards. (Pet. Br. 25). If Petitioner is correct, however, then this Court must necessarily have erred by underestimating the liberty interest to withhold the right to a jury determination in *McKeiver* (juvenile delinquency proceedings), an automatic right to counsel in *Morrissey* and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (parole and probation revocation hearings), the right to counsel in *Middendorf* (summary court-martial), the reasonable doubt standard in *Addington* (involuntary commitment proceedings), a prior judicial hearing in *Parham* (voluntary juvenile

civil commitment), and the fifth amendment privilege in *Minnesota v. Murphy* (probation revocation hearings). *See also French*, 428 F.Supp. at 1358-59 (liberty interest is insufficient to require the privilege in involuntary commitment proceedings). Very simply, the liberty interest has never been deemed determinative of the constitutional question. In the words of this Court in an analogous context, "[t]he fact that a proceeding will result in loss of liberty does not *ipso facto* mean that the proceeding is a 'criminal prosecution' ". *Middendorf*, 425 U.S. at 37, as cited with approval in *Allen*, 107 Ill.2d at 99.

Finally, it should be noted that accuracy of the factfinding mechanism has already been protected by the state. By virtue of state statute or judicial decision,[11] Allen at his sexually dangerous persons hearing was entitled to a variety of procedural protections. Allen received: notice of the petition and disclosure of the evidence against him; an opportunity to appear and present witnesses and documentary evidence before an independent decisionmaker; the right to confront and cross-examine adverse witnesses; a written transcript; and right to an appeal. Ill. Rev. Stat. ch. 38, pars. 105-4, 105-5 (1981); *People v. Nastasio*, 19

[11] A state may, of course, elect to extend procedural protections that are not compelled by the federal Constitution. *Fare v. Michael C.*, 442 U.S. 707, 731, n. 4 (1979); *Addington*, 441 U.S. at 431. Petitioner emphasizes the procedural rights already afforded the S.D.P. respondent, (Br. 19-20), but many of these are available only by legislative grant rather than as a matter of state or federal due process of law. *See, e.g., Studdard*, 51 Ill.2d at 196 (no due process right to jury determination of status). In a similar manner, state law provision for an adversarial hearing generally does not require application of additional procedural rights to plug every conceivable constitutional interstice. *See, e.g., McKeiver*, 403 U.S. at 542. *See also People v. Levy*, 311 P.2d 897, 900 (Cal. Ct. App. 1957) (additional procedural safeguards will not transform an essentially civil proceeding into a criminal action).

Ill.2d 524, 168 N.E.2d 728 (1960); *Capoldi*, 10 Ill.2d at 265. Allen had, but chose not to exercise, right to a preliminary determination of the voluntariness of his statements and a jury determination of his status. Ill. Rev. Stat. ch. 38, par. 105-5 (1981); *Capoldi*, 10 Ill.2d at 267; *Studdard*, 51 Ill.2d at 197. Most importantly, Allen was represented by counsel during a hearing in which the government proved his status by proof beyond reasonable doubt. Ill. Rev. Stat. ch. 38, par. 105-5 (1981); *Pembrock*, 62 Ill.2d at 321. *But see Addington*, 441 U.S. at 431. As a result, Petitioner received greater procedural protections than those required by *Morrissey*, 408 U.S. at 488-89. In the context of this existing constellation of rights designed to assure fundamental fairness,[12] then, the genuine issue is

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[12] Relying in part on this Court's decision in *Mathews v. Eldridge*, the Illinois Supreme Court decided that the due process clause does not require extension of the privilege to these proceedings. 107 Ill.2d at 102. The parties' present confusion concerning the applicability of *Mathews* stems in large measure from a fundamental disagreement concerning societal values to be promoted by the fifth amendment.

Pointing to this Court's comment in *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966), the Mental Health Information Service, Second Judicial Department, as *amicus curiae* argues that the privilege is not designed to assure accuracy of S.D.P. factfinding procedures. (Br. 9). *Accord Barter*, 425 U.S. at 319. As a result, *amicus* criticizes any application of *Mathews* to the case at bar. Petitioner, in contrast, citing *Gault*, 387 U.S. at 44-45, examines statement admissibility rather than factfinding procedures and argues "reliability is a concern of the privilege". (Br. 41). *Accord Miranda v. Arizona*, 384 U.S. 436 (1966). *Contra Gault*, 387 U.S. at 80, n. 3 (Stewart, J., dissenting) (confessions should be judged by the due process clause). Petitioner accordingly believes that the *Mathews* case provides a correct model for decision, but that the state court miscalculated the weight of competing interests. The American Psychiatric Association as *amicus curiae* apparently agrees with both. (Br. 21). Other courts have relied

(Footnote continued on following page)

whether the fifth amendment privilege could serve a distinctive and necessary purpose. *McKeiver*, 403 U.S. at 543; *Mathews*, 424 U.S. at 335; and *Addington*, 441 U.S. at 423.[13] Respondent now addresses that topic.

C. The Historical Fifth Amendment Values Of Freedom From Coercion And A Fair Balance Between The State And Its Individual Citizens Are Not Served By Extension Of The Privilege To A Mental Health Commitment Context.

A concern for inhumane treatment or coercive practices which encourage false confessions underlies the constitutional privilege. Although oppressive techniques alone offend the Anglo-American tradition of justice, *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961), statements may be rendered inadmissible under fifth amendment theory in the belief that coercion encourages false acknowledge-

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[12] *continued*
on *Mathews* to reject the privilege for involuntary commitment proceedings, however. *See, e.g., In Re Matthews*, 613 P.2d at 91.

It may well be true that different concerns obtain when, as here, the admission of statements, rather than the accuracy of factfinding procedures, is at issue. *McKeiver*, 403 U.S. at 543. To the extent that *Mathews* emphasizes the importance of determining the "probable value, if any, of [an] additional . . . procedural safeguard" to serve *any* of the values protected by the fifth amendment, Respondent has relied upon the *Mathews* decision in argument. Concerning the generally uncertain policies underlying the privilege, see McKay, *Self-Incrimination and the New Privacy*, 1967 Sup. Ct. Rev. 193.

[13] Judge Friendly has aptly characterized the present issue in his excellent article *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1300-1301 (1975): "[t]he trend in one area after another has been to say, 'If there, why not here?' And '[t]he tendency of a principle to expand itself to the limit of its logic' has not been much counteracted, as Cardozo expected, 'by the tendency to confine itself within the limits of its history' " (citation deleted). *Accord Gault*, 387 U.S. at 74 (Harlan, J., concurring).

ment of guilt. *Murphy*, 378 U.S. at 55; *Malloy*, 378 U.S. at 8; *Gault*, 387 U.S. at 45. In this connection, Petitioner broadly argues that recognition of the privilege here is imperative to assure truthfulness of disclosures made to examining psychiatrists. Allen peremptorily dismisses all other procedural safeguards as "simply inadequate". (Pet. Br. 31). To the extent that the privilege is genuinely needed for this purpose,[14] petitioner's argument within this particular case cannot withstand close scrutiny.

Although "compulsion" is essential to a fifth amendment violation, any suggestion of coercion is noticeably absent in this case. Petitioner has never claimed that his forensic examinations were conducted in a coercive atmosphere. Indeed, this Court's decision in *Estelle v. Smith* could be construed as rejecting any *per se* rule of the sort. 451 U.S. at 465. In a similar manner, petitioner did not allege that coercive techniques were actually practiced on him, and Allen did not pursue the pre-hearing voluntariness determination that was available to him under state law.[15] In fact, one of the psychiatrists concluded that Allen chose to talk to him in the hope of obtaining more favorable treatment as a sexually dangerous person rather than as a felon. (J.A. 36-37). Equally important, representation by counsel at the time of the examinations reduced the prospect of coercion. *Michael C.*, 442 U.S. at 719; *Smith*, 451 U.S. at 475 (Rehnquist, J., dissenting).

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[14] Concerning the protection already offered by the fourteenth amendment due process clause, *see Michigan v. Tucker*, 417 U.S. 443 (1974) and the cases cited in note 12, *supra*. *See also Mathews*, 424 U.S. at 335 concerning the importance of alternative safeguards for the fifth amendment privilege.

[15] The Illinois Supreme Court nevertheless independently determined that Allen's statements were voluntarily given. *Allen*, 107 Ill.2d at 101.

It is also noteworthy here that examining psychiatrists were not primarily concerned with truthfulness of statement content. (R. 116). For example, Drs. Colen and Beck examined Allen's logic and thought processes and probed for signs of hallucinations and delusions during the mental status examinations.[16] (R. 98). False disclosures, then, were equally probative of Allen's mental disorder.[17] *Cf. Addington*, 441 U.S. at 429 (examining psychiatrists assess the meaning of the facts). Indeed, partial disclosures or half-truths given under a claim of privilege would actually "derogate[ ] rather than improve[ ] the chances for accurate decisions" in this proceeding. *Baxter*, 425 U.S. at 319. *See also United States v. Albright*, 388 F.2d 719, 725 (4th Cir. 1968) (noting danger of half-truths in an insan-

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[16] Allen reported hearing voices which told him to "kill himself". (J.A. 34; R. 98).

[17] The extent to which Allen's statements could be used as "real" rather than as "testimonial" evidence in this civil inquiry is presently unclear. *Compare Smith*, 451 U.S. at 463-65 *with Addington*, 441 U.S. at 429. Under the concept of a verbal act, borrowed from the law of hearsay, a respondent's disclosures are not considered for the truth of matters asserted therein but as material from which expert medical opinion is drawn. *See, e.g., Schmerber v. California*, 384 U.S. 757 (1966) (blood samples) and *United States v. Baird*, 414 F.2d 700, 709 (2d Cir. 1969), *cert. denied*, 390 U.S. 1005 (1970) (insanity inquiry). Consider as well the opinion delivered by Circuit Judge Blackmun in *Pope v. United States*, 372 F.2d 710, 721 (8th Cir. 1967) (en banc), *vacated and remanded on other grounds*, 392 U.S. 651 (1968) (holding "real" evidence of defendant's mental state is admissible to rebut a claim of insanity). Where, as here, a man's statements have an independent clinical significance, and the basic issue is not whether "the accused committed the act alleged", *Addington* at 429, there is a compelling suggestion that the psychiatrists questioned Allen "in the belief that the substance of [his] responses or the way in which he gave them might cast light on what manner of man he was". *Smith*, 451 U.S. at 475 (Rehnquist, J., dissenting), citing *Hollis v. Smith*, 571 F.2d 685, 690-91 (2d Cir. 1978) (construing New York Sex Offenders Law). *See also California v. Byers*, 402 U.S. at 432.

ity inquiry). Because truthfulness of statement content is not a primary concern when assessing mental illness, the privilege should not be extended beyond its historical limits to exclude reliable and freely given evidence of a man's mental state.

Allen next suggests that respondent-generated evidence is *per se* objectionable. The fifth amendment does reflect the belief that "a fair state-individual balance" requires the government to "shoulder the entire load". *Murphy*, 378 U.S. at 55 (citation deleted). The government has never been denied all access to a man's voluntary statements or other reliable evidence, however.[18] *Michigan v. Tucker*, 417 U.S. at 449-50; *Schmerber v. California*, 384 U.S. 757 (1966). Equally important, this argument for the privilege, which suggests the government can find necessary proof from secondary sources, loses its persuasiveness in the distinctive context of a mental illness inquest. Whereas other reliable sources of evidence are available to establish juvenile delinquency or commission of a crime, mental illness is not susceptible of objective proof. Respondent directly challenges the notion that the government could reliably prove respondent's mental disorder without the direct and "best evidence" provided by respondent's self-description.[19] This Court has already noted the desirability of expert medical opinion in other contexts,

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[18] If the "fair balance" rationale is sufficient reason alone to exclude evidence, then no confession, however voluntarily made, could ever be admitted in evidence. The fair balance language was coined by Dean Wigmore who did not recognize the applicability of the privilege outside the courtroom. In his view, the privilege only prohibited calling the defendant as a witness. Friendly, *The Fifth Amendment Tomorrow*, 37 U. Cin. L. Rev. 671, 690 (1968).

[19] The problem is exacerbated when, as here, the government shoulders the burden of proof beyond reasonable doubt. *Culombe*, 367 U.S. at 576; *Addington*, 441 U.S. at 430.

Barefoot, 463 U.S. at 898-99, and psychiatrists do—and should—rely on a respondent's interpretation of his own behavior. Compare the necessity for "self-reporting" in *Byers*, 402 U.S. at 426 and see *Parham*, 442 U.S. at 607; *Smith*, 451 U.S. at 465; *Gomes*, 471 F.2d at 799; and *Rollerson v. United States*, 343 F.2d 269, 271 (D.C. Cir. 1964). *See also* Brief for American Psychiatric Association as *amicus curiae* in *Smith*, 451 U.S. at 464, n. 8 (expressing the belief that predictions of future dangerousness cannot be made without resort to defendant's statements).

Perhaps Judge Friendly has best summarized our present concern:

> [i]t is a curious principle that would prohibit investigators from beginning their investigation by seeking information from the person best qualified to give it and would require them to operate under the rules of blind man's buff.

Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cin. L. Rev. 671, 691 (1968). Where, as here, the State cannot prove its case by the independent labor of its officers, the questioning acquires a compelling necessity which is its own justification, and the privilege should not be recognized. *See generally Culombe v. Connecticut*, 367 U.S. 568, 571 (1961).[20] For

[20] The Mental Health Information Service, Second Judicial Department, as *amicus curiae* has expressed concern that forensic examinations also threaten the inviolability of the human personality and the right of every citizen to a "private enclave" of thoughts. (Br. 10-11). This idea was first expressed in *United States v. Grunewald*, 233 F.2d 556, 581-82 (2d Cir. 1956) (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957). Respondent does not find this rationale to be determinative or even persuasive in the present case. If this argument were accepted, then no voluntarily given

(Footnote continued on following page)

testimony that is required by law, a fifth amendment right to silence is ill-advised. The fourteenth amendment assurance of voluntary statements provides the appropriate and adequate safeguard.

D. A Right To Silence During Psychiatric Examinations Would Thwart The Diagnostic And Treatment Purposes Of The Proceedings.

Petitioner cannot realistically deny that a right of silence during forensic examination would present a significant obstruction; the only genuine issue is whether that burden is reasonable and constitutionally required. *Culombe*, 367 U.S. at 580. Respondent submits that recognition of a fifth amendment privilege during forensic evaluation would have a seriously debilitating effect on the sexually dangerous persons inquiry.[21]

As the factual summary to this brief has demonstrated, the mental status evaluation is a complex event during which the examiner seeks to assess the meaning of a "host of subtle but important behaviors" to reach a clinical conclusion. *Byers*, 740 F.2d at 1168 (dissenting opinion).

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[20] *continued*
confession could ever be used, or any witness subpoenaed for testimony, in any criminal or civil proceeding. The privacy theory is carefully examined and debunked by Judge Friendly, *supra* note 18, at 687-90. *See also Taylor v. Best*, 746 F.2d 220, 225 (4th Cir. 1984) (rejecting privacy rationale to hold the privilege inapplicable in prison interviews).

[21] After reviewing all the theories invoked by courts to deny the privilege in insanity inquiries, the District of Columbia Circuit Court noted "they have denied the Fifth Amendment claim primarily because of the unreasonable and debilitating effect it would have upon society's conduct of a fair inquiry into defendant's culpability". *Byers*, 740 F.2d at 1104. That court forthrightly refused to recognize the privilege for pragmatic reasons alone. *Id.*

See also Addington, 441 U.S. at 429. The personal interview itself has been variously described as "absolutely indispensable", as "a very essential ingredient", and as "the basic tool of psychiatric study" which "requires rapport" between the examiner and respondent. *Sas*, 295 F.Supp. at 411; *Commonwealth ex rel. Finken v. Roop*, 234 Pa. Super. 155, 339 A.2d 764, 782 (1975), *cert. denied*, 424 U.S. 960 (1976) (dissenting opinion); and *Rollerson*, 343 F.2d at 274.

In this endeavor, silence could never aid but could destroy the diagnostic process and thereby defeat the purpose of the proceeding. *Tippett*, 436 F.2d at 1162 (Sobeloff, J., concurring). This Court has consistently refused to impose impossible burdens upon the states. *Gault*, 387 U.S. at 71 (Harlan, J., concurring). In the particular context of involuntary commitment, the Court has refused to undercut the interests of both the state and the individual in needed psychiatric care. *Addington*, 441 U.S. at 430. *Cf. Smith*, 451 U.S. at 50, n. 59. To the extent that an examining psychiatrist needs to inquire into past criminal conduct, he should be permitted to do so as long as his opinions are received only to establish respondent's status as a person in need of psychiatric care. Model Penal Code § 4.09 (Proposed Official Draft, 1962); *State v. Whitlow*, 45 N.J. 3, 210 A.2d 763, 769 (1965); *Albright*, 388 F.2d at 726, n. 9. *Compare Smith*, 451 U.S. at 466 (where statements were used in the "distinct circumstances" of a death penalty hearing).

Without the information necessary for psychiatric diagnoses, state courts could be compelled to make medico-legal determinations without the benefit of expert medical testimony. Equally serious, elimination of this civil involuntary commitment alternative could only result in a Pyrrhic victory in which mentally ill persons are subjected

to criminal prosecution and denied the benefit of needed psychiatric care. In Respondent's considered opinion, extension of the fifth amendment privilege to sexually dangerous persons proceedings is both unwarranted and unwise.

II.

BECAUSE PSYCHIATRIC EXAMINATIONS DO NOT PRESENT THE INHERENTLY COERCIVE ATMOSPHERE CONDEMNED IN *MIRANDA v. ARIZONA*, 384 U.S. 436 (1966), ANY FIFTH AMENDMENT PRIVILEGE IS NOT SELF-EXECUTING AND MUST BE CLAIMED BY A COUNSELED EXAMINEE.

As noted earlier, the S.D.P. respondent enjoys immunity from criminal prosecution arising from disclosures made during psychiatric examination. Petitioner nonetheless urges that the fifth amendment privilege should extend to shield disclosures offered to prove his mental condition. In this connection, he insists that the privilege is meaningful only if the respondent is advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966) before any psychiatric examination. However, his claim is tenable only if this Court concludes that psychiatric examinations present the same kind of inherently coercive atmosphere that a criminal defendant encounters during custodial police interrogation at the stationhouse. Respondent submits that the better-reasoned authorities indicate that no formal warnings are necessary for the counseled respondent during a forensic evaluation in which there are no compelling pressures to admit criminal liability. Respondent further believes that *Miranda* warnings would work the same stultifying effect on psychiatric diagnosis that is presented by application of the privilege generally. Because *Miranda* warnings are wholly inappropriate in this context, the general rule of privilege assertion should remain.

As Justice Rehnquist succinctly observed in *Estelle v. Smith*,

> [t]he *Miranda* requirements were certainly not designed by this Court with psychiatric examinations in mind.

451 U.S. at 475. The focus of the *Miranda* Court's concern was "incommunicado interrogation of individuals in a police-dominated atmosphere" in which a criminal suspect could be exposed to any number of physically or psychologically coèrcive techniques without the assistance and protection of counsel. *Miranda*, 384 U.S. at 445. In the oft-repeated language of the Court, that atmosphere "carries its own badge of intimidation". *Id.* at 457. Neither this Court nor Petitioner has ever suggested that psychiatrists during forensic evaluation similarly seek to subjugate the examinee's will to force admissions of criminal culpability. In fact, by suggesting in *dicta* that competency and sanity diagnoses are outside the scope of the fifth amendment, this Court has apparently rejected that very argument. *Smith*, 451 U.S. at 465-66. The state courts have reached the same conclusion. *See, e.g., In Re Ottolini*, 73 Ill.App.3d 971, 975, 392 N.E.2d 736 (1979); *Moss v. State*, 539 S.W.2d 936, 946 (Tex. Civ. App. 1976). In sum, *Miranda* warnings represent "extraordinary safeguards" that are not required outside the situation for which they were designed. *Murphy*, 465 U.S. at ____, 104 S.Ct. at 1144, 79 L.Ed.2d at 421, citing *Roberts v. United States*, 445 U.S. 552 (1980). *Accord Baxter*, 425 U.S. at 315. *See also Michael C.*, 442 U.S. at 717, n.4 wherein the Court observed that *Miranda* warnings have not been required even in the quasi-criminal delinquency proceedings for which *Gault* recognized a fifth amendment privilege.

This conclusion is not altered by the fact that Petitioner was in custody at the time of the examinations. *Baxter*, 425 U.S. at 315 (*dicta* rejecting applicability of *Miranda* theory although defendant was incarcerated in a state prison). Nor was the fact that Allen attended the examinations pursuant to court order a determinative factor. *Murphy*, 465 U.S. at ____, 104 S.Ct. at 1141, 79 L.Ed.2d at 422 (general obligation to appear and answer questions truthfully does not convert otherwise voluntary statements into "compelled" speech). In this connection, Respondent resists any suggestion that psychiatrists selected by the court, and required by statute to report to the court, were state agents who engineered an adversarial confrontation. Compare the use of a "surprise" State's witness in *Smith*, 451 U.S. at 467. Finally, there was no custodial "interrogation" here for *Rhode Island v. Innis*, 446 U.S. 291 (1980), because the examining psychiatrists did not seek to ascertain petitioner's guilt or innocence. *Smith*, 451 U.S. at 476 (Rehnquist, J., dissenting). *See also State v. O'Neill*, 545 P.2d 97, 103 (Or. Sup. Ct. 1976).

Most important for the present case, Petitioner was represented by counsel[22] at the time of the examinations.

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[22] If, as Petitioner suggests, there is a right to *Miranda* warnings to protect the fifth amendment right to silence, then presumably there is a concomitant right to the presence of counsel during the examinations to protect that privilege. Under Petitioner's theory of the case, the logic is compelling. This suggestion has been flatly rejected by every court to consider it, however. *See Smith*, 451 U.S. at 470, n. 14. *See also Thornton v. Corcoran*, 407 F.2d 695, 705 (1969) (separate opinion of Burger, J.). Moreover, if petitioner correctly deems the S.D.P. proceeding to be a criminal prosecution, then presumably there is a separate sixth amendment right to counsel during this critical stage of the proceedings. *See generally United States v. Wade*, 388 U.S. 218 (1967). *But see United States v. Byers*, 740 F.2d at 1118 for a particularly scathing criticism of the need for counsel as a passive observer during psychiatric examination.

Allen's attorney did not attend the sessions, and Allen never requested legal consultation during questioning. *Compare Smith*, 451 U.S. at 459, n. 5 (sixth amendment violation found after examiner was appointed by *ex parte* order without notice to counsel). Counsel provides the protection which renders *Miranda* warnings unnecessary. *Miranda*, 384 U.S. at 466; *Michael C.*, 442 U.S. at 719. Equally important, Terry Allen affirmatively knew that his disclosures could be used to determine his status as a sexually dangerous person. (J.A. 36; R. 126-27, 251). *See Barboza*, 438 N.E.2d at 1070 (this knowledge is sufficient reason to deny any privilege during a sexually dangerous persons examination). *Cf. Murphy*, 465 U.S. at ____, 104 S.Ct. at 1145, 79 L.Ed.2d at 423 (a probationer is charged with the knowledge that his probation officer will report wrongdoing).

Absent compelling reasons for *Miranda* admonitions, the burdens associated with the rule should not be imposed upon the states' efforts to diagnose and treat the mentally ill. Respondent has already examined the effect of the fifth amendment privilege on forensic examinations; we merely observe at this time that state and federal courts have similarly expressed considerable alarm concerning *Miranda* warnings as well. *See, e.g., O'Neill*, 545 P.2d at 104 and *Byers*, 740 F.2d at 1115.

Respondent endorses the conclusion of Mr. Justice Rehnquist that, in the context of psychiatric examinations, the fifth amendment is not self-executing. *Smith*, 451 U.S. at 475. This conclusion enjoys solid support in a long line of decisions of this Court, most notably the cases concerning grand jury investigations and tax returns. *See, e.g., United States v. Mandujano*, 425 U.S. 564, 574-75 (1976); *Garner v. United States*, 424 U.S. 648, 653-55 (1976). The witness who fails to assert the privilege forfeits the bene-

fit of its protection. *Murphy*, 465 U.S. at ____, 104 S.Ct. at 1142, 79 L.Ed.2d at 419. On the facts of this particular case, however, there is also every reason to conclude that petitioner Allen knowingly rejected any fifth amendment protection.[23]

CONCLUSION

An Illinois Sexually Dangerous Persons proceeding is not a "criminal case" for which the fifth amendment privilege against self-incrimination is constitutionally required. Because Allen's statements to examining psychiatrists were properly received to formulate expert opinion in this mental health commitment proceeding, the judgment below should be affirmed.

Alternatively, because extension of the privilege would not promote the traditional values of the fifth amendment, and would seriously thwart the state's legitimate diagnostic and treatment goals, the privilege is not required to assure fundamental procedural fairness for the fourteenth amendment due process clause.

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[23] As this Court observed in *Murphy*, non-assertion of the privilege is properly considered a forfeiture rather than a waiver under *Johnson v. Zerbst*, 304 U.S. 458 (1938). Because Petitioner suggests that *Miranda* admonitions are required, however, this Court has every right to question whether, with Petitioner's proposal, a mentally ill respondent who is also incompetent can ever enter a knowing and intelligent waiver. *Pate v. Robinson*, 383 U.S. 375, 384 (1976). *See generally Developments*, *supra* at 1314. Fortunately that issue is not presented in this case; this record reveals Allen's deliberate decision to seek S.D.P. adjudication.

Finally, even if there were a privilege in these proceedings for which *Miranda v. Arizona* warnings could be required, judgment should be affirmed because Allen's counseled disclosures were freely and voluntarily given in the knowledge that his statements could be used to establish his need for medical care. There was no constitutional error in this case.

Respectfully submitted,

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APPENDIX

THE MENARD PSYCHIATRIC CENTER'S
SEXUAL TREATMENT OPPORTUNITY PROGRAM
APRIL 1983 STATISTICAL REPORT

STOP PARTICIPANTS BY TYPE OF VICTIM	Percent	Total
SDPs Offending Against Adults	10%	5
VSOs Offending Against Adults	19%	9
SDPs Offending Against Children	38%	16
VSOs Offending Against Children	33%	18
All SDPs	48%	23
All VSOs	52%	25
TOTAL	100%	48

STOP PARTICIPANTS BY AGE	Mean	Range
SDPs Offending Against Adults	31.4	20 - 61
VSOs Offending Against Adults	29.3	24 - 39
SDPs Offending Against Children	35.3	22 - 73
VSOs Offending Against Children	27.7	18 - 43
All SDPs	34.5	20 - 73
All VSOs	28.5	18 - 43
TOTAL	31.5	18 - 73

STOP PARTICIPANTS BY RACE	White	Black	Indian
SDPs Offending Against Adults	60%	40%	0%
VSOs Offending Against Adults	89%	21%	0%
SDPs Offending Against Children	78%	11%	11%
VSOs Offending Against Children	100%	0%	0%
All SDPs	74%	17%	9%
All VSOs	96%	4%	0%
TOTAL	85%	11%	4%

STOP PARTICIPANTS BY MARRIAGE	Single	Married	Divorced
SDPs Offending Against Adults	80%	0%	20%
VSOs Offending Against Adults	44%	12%	44%
SDPs Offending Against Children	72%	5%	23%
VSOs Offending Against Children	75%	19%	6%
All SDPs	74%	4%	23%
All VSOs	72%	16%	22%
TOTAL	69%	10%	21%

STOP PARTICIPANTS BY EDUCATIONAL LEVEL	Years	Range
SDPs Offending Against Adults	11.2	10 - 12
VSOs Offending Against Adults	11.4	9 - 12
SDPs Offending Against Children	10.6	7 - 14
VSOs Offending Against Children	11.0	3 - 16
All SDPs	10.4	7 - 14
All VSOs	11.1	3 - 16
TOTAL	10.8	3 - 16

STOP PARTICIPANTS IN ARMED FORCES	Percent
SDPs Offending Against Adults	20%
VSOs Offending Against Adults	34%
SDPs Offending Against Children	44%
VSOs Offending Against Children	25%
All SDPs	39%
All VSOs	28%
TOTAL	33%

STOP PARTICIPANTS WHO WERE IN FOSTER CARE	Percent
SDPs Offending Against Adults	0%
VSOs Offending Against Adults	34%
SDPs Offending Against Children	28%
VSOs Offending Against Children	13%
All SDPs	22%
All VSOs	20%
TOTAL	21%

STOP PARTICIPANTS WHO WERE IN JUVENILE CENTERS	Percent
SDPs Offending Against Adults	0%
VSOs Offending Against Adults	33%
SDPs Offending Against Children	39%
VSOs Offending Against Children	25%
All SDPs	30%
All VSOs	28%
TOTAL	29%

PARTICIPANTS IN JUV. CENTERS OR FOSTER CARE	Percent
SDPs Offending Against Adults	0%
VSOs Offending Against Adults	56%
SDPs Offending Against Children	45%
VSOs Offending Against Children	25%
All SDPs	38%
All VSOs	36%
TOTAL	35%

STOP PARTICIPANTS WITH SCHOOL BEHAVIOR PROBLEMS	Percent
SDPs Offending Against Adults	0%
VSOs Offending Against Adults	78%
SDPs Offending Against Children	50%
VSOs Offending Against Children	50%
All SDPs	39%
All VSOs	60%
TOTAL	50%

STOP PARTICIPANTS WHO ATTEMPTED SUICIDE	Percent
SDPs Offending Against Adults	0%
VSOs Offending Against Adults	78%
SDPs Offending Against Children	28%
VSOs Offending Against Children	63%
All SDPs	22%
All VSOs	68%
TOTAL	46%

STOP PARTICIPANTS WITH ALCOHOL PROBLEMS	Percent
SDPs Offending Against Adults	80%
VSOs Offending Against Adults	66%
SDPs Offending Against Children	44%
VSOs Offending Against Children	50%
All SDPs	52%
All VSOs	56%
TOTAL	54%

STOP PARTICIPANTS WHO ABUSED DRUGS	Percent
SDPs Offending Against Adults	60%
VSOs Offending Against Adults	78%
SDPs Offending Against Children	50%
VSOs Offending Against Children	66%
All SDPs	49%
All VSOs	56%
TOTAL	52%

STOP PARTICIPANTS ABUSING ALCOHOL OR DRUGS	Percent
SDPs Offending Against Adults	80%
VSOs Offending Against Adults	100%
SDPs Offending Against Children	63%
VSOs Offending Against Children	75%
All SDPs	61%
All VSOs	84%
TOTAL	73%

STOP PARTICIPANTS WHO'VE HAD ALCOHOL TREATMENT	Percent
SDPs Offending Against Adults	40%
VSOs Offending Against Adults	44%
SDPs Offending Against Children	22%
VSOs Offending Against Children	19%
All SDPs	26%
All VSOs	28%
TOTAL	27%

STOP PARTICIPANTS WHO'VE HAD DRUG ABUSE TREATMENT	Percent
SDPs Offending Against Adults	40%
VSOs Offending Against Adults	22%
SDPs Offending Against Children	6%
VSOs Offending Against Children	13%
All SDPs	13%
All VSOs	16%
TOTAL	15%

PARTICIPANTS WITH PRIOR INPATIENT/OUTPATIENT THERAPY	Percent
SDPs Offending Against Adults	60%
VSOs Offending Against Adults	100%
SDPs Offending Against Children	72%
VSOs Offending Against Children	69%
All SDPs	70%
All VSOs	80%
TOTAL	75%

PARTICIPANTS WITH PHYSICALLY ABUSED SIBLINGS	Percent
SDPs Offending Against Adults	40%
VSOs Offending Against Adults	44%
SDPs Offending Against Children	31%
VSOs Offending Against Children	13%
All SDPs	35%
All VSOs	24%
TOTAL	29%

PARTICIPANTS WITH SEXUALLY ABUSED SIBLINGS	Percent
SDPs Offending Against Adults	20%
VSOs Offending Against Adults	33%
SDPs Offending Against Children	17%
VSOs Offending Against Children	6%
All SDPs	17%
All VSOs	16%
TOTAL	17%

STOP PARTICIPANTS WHO WERE PHYSICALLY ABUSED	Percent
SDPs Offending Against Adults	60%
VSOs Offending Against Adults	89%
SDPs Offending Against Children	50%
VSOs Offending Against Children	56%
All SDPs	52%
All VSOs	68%
TOTAL	60%

STOP PARTICIPANTS WHO WERE SEXUALLY ABUSED	Percent
SDPs Offending Against Adults	60%
VSOs Offending Against Adults	44%
SDPs Offending Against Children	75%
VSOs Offending Against Children	69%
All SDPs	65%
All VSOs	60%
TOTAL	63%

STOP PARTICIPANTS PHYSICALLY OR SEXUALLY ABUSED	Percent
SDPs Offending Against Adults	80%
VSOs Offending Against Adults	89%
SDPs Offending Against Children	75%
VSOs Offending Against Children	69%
All SDPs	70%
All VSOs	76%
TOTAL	73%

STOP PARTICIPANTS SEXUALLY AND PHYSICALLY ABUSED	Percent
SDPs Offending Against Adults	40%
VSOs Offending Against Adults	56%
SDPs Offending Against Children	50%
VSOs Offending Against Children	25%
All SDPs	48%
All VSOs	36%
TOTAL	42%

PARTICIPANTS/ SIBLINGS - PHYSICALLY OR SEXUALLY ABUSED	Percent
SDPs Offending Against Adults	80%
VSOs Offending Against Adults	100%
SDPs Offending Against Children	67%
VSOs Offending Against Children	81%
All SDPs	70%
All VSOs	88%
TOTAL	81%

PARTICIPANTS SEXUALLY ABUSED BY A RELATIVE	Percent
SDPs Offending Against Adults	60%
VSOs Offending Against Adults	56%
SDPs Offending Against Children	8%
VSOs Offending Against Children	13%
All SDPs	30%
All VSOs	28%
TOTAL	31%

PARTICIPANTS SEXUALLY ABUSED BY A NON-RELATIVE	Percent
SDPs Offending Against Adults	20%
VSOs Offending Against Adults	44%
SDPs Offending Against Children	50%
VSOs Offending Against Children	63%
All SDPs	43%
All VSOs	56%
TOTAL	50%

PARTICIPANTS SEXUALLY ABUSED BY A FEMALE	Percent
SDPs Offending Against Adults	40%
VSOs Offending Against Adults	33%
SDPs Offending Against Children	28%
VSOs Offending Against Children	6%
All SDPs	30%
All VSOs	16%
TOTAL	23%

PARTICIPANTS SEXUALLY ABUSED BY A MALE	Percent
SDPs Offending Against Adults	20%
VSOs Offending Against Adults	56%
SDPs Offending Against Children	33%
VSOs Offending Against Children	69%
All SDPs	30%
All VSOs	64%
TOTAL	48%

STOP PARTICIPANTS WITH PRIOR NON-SEX CONVICTIONS	Percent
SDPs Offending Against Adults	40%
VSOs Offending Against Adults	22%
SDPs Offending Against Children	28%
VSOs Offending Against Children	44%
All SDPs	30%
All VSOs	36%
TOTAL	33%

PARTICIPANTS WITH PRIOR SEXUAL OFFENSE CONVICTIONS	Percent
SDPs Offending Against Adults	40%
VSOs Offending Against Adults	22%
SDPs Offending Against Children	56%
VSOs Offending Against Children	44%
All SDPs	52%
All VSOs	36%
TOTAL	44%

PARTICIPANTS: PAROLE VIOLATORS, NON-SEXUAL OFFENSE	Percent
SDPs Offending Against Adults	0%
VSOs Offending Against Adults	0%
SDPs Offending Against Children	0%
VSOs Offending Against Children	13%
All SDPs	0%
All VSOs	8%
TOTAL	4%

PARTICIPANTS: PAROLE VIOLATORS, SEXUAL OFFENSE	Percent
SDPs Offending Against Adults	20%
VSOs Offending Against Adults	11%
SDPs Offending Against Children	22%
VSOs Offending Against Children	13%
All SDPs	22%
All VSOs	12%
TOTAL	17%

VSOs OFFENDING AGAINST ADULTS BY OFFENSE	Percent
Murder/Deviate Sexual Assault	11%
Attempted Rape/Attempted Murder	12%
Rape/Deviate Sexual Assault	44%
Attempted Rape	33%
TOTAL	100%

VSOs OFFENDING AGAINST CHILDREN BY OFFENSE	Percent
Murder/Deviate Sexual Assault	19%
Attempted Murder	6%
Rape	6%
Burglary	6%
Indecent Liberties With a Child	63%
TOTAL	100%

SDPs OFFENDING AGAINST ADULTS	Percent	Number of Victims
Who Have Sexually Abused Juvenile Female Relatives	40%	1.0
Who Have Sexually Abused Other Juvenile Females	40%	4.0
Who Have Sexually Abused Adult Female Relatives	20%	2.0
Who Have Sexually Abused Other Adult Females	100%	13.4
Who Have Sexually Abused Juvenile Male Relatives	0	0
Who Have Sexually Abused Other Juvenile Males	0	0

Who Have Sexually Abused Adult Male Relatives	0	0
Who Have Sexually Abused Other Adult Males	0	0
AVERAGE NUMBER OF MALE VICTIMS		0
AVERAGE NUMBER OF FEMALE VICTIMS		15.6
AVERAGE NUMBER OF VICTIMS		15.6

SDPs OFFENDING AGAINST CHILDREN	Percent	Average # Of Victims
Who Have Sexually Abused Juvenile Female Relatives	56%	.8
Who Have Sexually Abused Other Juvenile Females	67%	53.8
Who Have Sexually Abused Adult Female Relatives	0%	0
Who Have Sexually Abused Other Adult Females	28%	52.4
Who Have Sexually Abused Juvenile Male Relatives	22%	.8
Who Have Sexually Abused Other Juvenile Males	67%	49.3
Who Have Sexually Abused Adult Male Relatives	6%	5
Who Have Sexually Abused Other Adult Males	11%	4
AVERAGE NUMBER OF MALE VICTIMS		44.2
AVERAGE NUMBER OF FEMALE VICTIMS		30.8
AVERAGE NUMBER OF VICTIMS		61.7

VSOs OFFENDING AGAINST ADULTS	Percent	Average # Of Victims
Who Have Sexually Abused Juvenile Female Relatives	56%	1.8
Who Have Sexually Abused Other Juvenile Females	66%	19.0
Who Have Sexually Abused Adult Female Relatives	22%	1.5
Who Have Sexually Abused Other Adult Females	100%	8.2
Who Have Sexually Abused Juvenile Male Relatives	0%	0

Who Have Sexually Abused Other Juvenile Males	0%	0
Who Have Sexually Abused Adult Male Relatives	0%	0
Who Have Sexually Abused Other Adult Males	0%	0
AVERAGE NUMBER OF MALE VICTIMS		0
AVERAGE NUMBER OF FEMALE VICTIMS		23.8
AVERAGE NUMBER OF VICTIMS		23.8

VSOs OFFENDING AGAINST JUVENILES	Percent	Average # Of Victims
Who Have Sexually Abused Juvenile Female Relatives	31%	1.3
Who Have Sexually Abused Other Juvenile Females	50%	6.6
Who Have Sexually Abused Adult Female Relatives	0%	0
Who Have Sexually Abused Other Adult Females	13%	1
Who Have Sexually Abused Juvenile Male Relatives	44%	1.8
Who Have Sexually Abused Other Juvenile Males	63%	45.7
Who Have Sexually Abused Adult Male Relatives	13%	3.5
Who Have Sexually Abused Other Adults	19%	2.0
AVERAGE NUMBER OF MALE VICTIMS		48.1
AVERAGE NUMBER OF FEMALE VICTIMS		7.0
AVERAGE NUMBER OF VICTIMS		30.6

PARTICIPANTS OFFENDING AGAINST MALES AND FEMALES	Percent
SDPs Offending Against Adults	0%
VSOs Offending Against Adults	0%
SDPs Offending Against Children	56%
VSOs Offending Against Children	19%
All SDPs	43%
All VSOs	12%
TOTAL	27%

PARTICIPANTS OFFENDING AGAINST JUVENILES & ADULTS	Percent
SDPs Offending Against Adults	40%
VSOs Offending Against Adults	78%
SDPs Offending Against Children	39%
VSOs Offending Against Children	31%
All SDPs	39%
All VSOs	48%
TOTAL	44%

SDPs OFFENDING AGAINST RELATIVES/FRIENDS & STRANGERS	Average Number F & R	Average Number Stranger
SPDs Offending Against Adults— Juvenile Female Victims	1.0	4.0
SPDs Offending Against Adults— Adult Female Victims	0.5	13.2
SPDs Offending Against Adults— Juvenile Male Victims	0	0
SPDs Offending Against Adults— Adult Male Victims	0	0
SPDs Offending Against Children/ Juvenile Female Victims	6.1	33.2
SPDs Offending Against Children/ Adult Female Victims	16.5	57.3
SPDs Offending Against Children/ Juvenile Male Victims	12.0	50.7
SPDs Offending Against Children/ Adult Male Victims	8.0	5.8

	Percent Against F & R	Percent Against Stranger
SPDs Offending Against Adults— Juvenile Female Victims	40%	40%
SPDs Offending Against Adults— Adult Female Victims	20%	100%
SPDs Offending Against Adults— Juvenile Male Victims	0%	0%
SPDs Offending Against Adults— Adult Male Victims	0%	0%

SPDs Offending Against Children/ Juvenile Female Victims	56%	44%
SPDs Offending Against Children/ Adult Female Victims	11%	22%
SPDs Offending Against Children/ Juvenile Male Victims	22%	61%
SPDs Offending Against Children/ Adult Male Victims	6%	6%

VSOs OFFENDING AGAINST FRIENDS/RELATIVES & STRANGERS	Number F & R	Number Stranger
VSOs Offending Against Adults— Juvenile Female Victims	10.3	22.0
VSOs Offending Against Adults— Adult Female Victims	4.3	8.0
VSOs Offending Against Adults— Juvenile Male Victims	0	0
VSOs Offending Against Adults— Adult Male Victims	0	0
VSOs Offending Against Children/ Juvenile Female Victims	2.3	6.8
VSOs Offending Against Children/ Adult Female Victims	1.0	0
VSOs Offending Against Children/ Juvenile Male Victims	31.4	28.2
VSOs Offending Against Children/ Adult Male Victims	1.0	3.7

VSOs OFFENDING AGAINST FRIENDS/RELATIVES & STRANGERS	Percent Against F & R	Percent Against Strangers
VSOs Offending Against Adults— Juvenile Female Victims	78%	33%
VSOs Offending Against Adults— Adult Female Victims	89%	56%
VSOs Offending Against Adults— Juvenile Male Victims	0%	0%
VSOs Offending Against Adults— Adult Male Victims	0%	0%
VSOs Offending Against Children/ Juvenile Female Victims	63%	38%

VSOs Offending Against Children/ Adult Female Victims	6%	0%
VSOs Offending Against Children/ Juvenile Male Victims	50%	38%
VSOs Offending Against Children/ Adult Male Victims	6%	19%

SDPs OFFENDING AGAINST ADULTS—PROGRAMATIC ACTIVITY

Percentage in Individual Therapy*	20%
Percentage in Group Therapy	80%
Percentage on Institutional Job Assignment	80%
Percentage in Activity/Arts/Leisure Therapy	20%
Percentage in Educational Programs	20%
Percentage in Vocational Training	0%

SDPs OFFENDING AGAINST ADULTS—PROGRAMATIC ACTIVITY

Percentage in Individual Therapy*	23%
Percentage in Group Therapy	77%
Percentage on Institutional Job Assignment	88%
Percentage in Activity/Arts/Leisure Therapy	63%
Percentage in Educational Programs	11%
Percentage in Vocational Training	11%

SDPs OFFENDING AGAINST CHILDREN—PROGRAMATIC ACTIVITY

Percentage in Individual Therapy*	33%
Percentage in Group Therapy	67%
Percentage on Institutional Job Assignment	67%
Percentage in Activity/Arts/Leisure Therapy	72%
Percentage in Educational Programs	17%
Percentage in Vocational Training	6%

SDPs OFFENDING AGAINST CHILDREN—PROGRAMATIC ACTIVITY

Percentage in Individual Therapy	0%
Percentage in Group Therapy	100%
Percentage on Institutional Job Assignment	94%
Percentage in Activity/Arts/Leisure Therapy	63%
Percentage in Educational Programs	6%
Percentage in Vocational Training	0%

SDP STATISTICS

SDPs Presently at MPC 23

SDPs Dead (Died at MPC) 1

SDPs Released 36

SDPs Known to have Recidivated 6

Total Percent of SDPs Recidivating 17%

SDPs Recidivating with a New Sentence 14%

SDPs Recidivating with a Technical Violation 03%